Supreme Court, U. S.
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80-191

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

Brian A. Carlson,

Petitioner,

v.

United States of America.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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QUESTIONS PRESENTED

1. In light of the decisions of this Court in United States v. Sullivan, 274 U.S. 259 (1927), and Garner v. United States, 424 U.S. 648 (1976), can the Petitioner, who filed a tax return and claimed the fifth amendment privilege against compulsory self-incrimination with regard to questions on the return, be denied the benefit of the privilege where the court of appeals found that the questions he refused to answer produced a substantial threat of self-incrimination?

2. Was the court of appeals, in reliance on this Court's decision in California v. Byers, 402 U.S. 424 (1971), correct in balancing the need for public revenue collection by a system of self-reporting against the Petitioner's fifth amendment privilege and denying the Petitioner the benefit of the privilege?

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II. The court of appeals, in holding that the Petitioner was not entitled to claim the fifth amendment privilege on his tax return, balanced the need for public revenue collection by a system of self-reporting against the Petitioner's privilege against compulsory self-incrimination. Such a balancing approach has never been applied by this Court in a case such as this and is a serious matter for this Court's consideration since the application of such a balancing test inevitably results in a substantial impairment of taxpayer's fifth amendment rights. In the instant case, the Court of appeals use of this balancing test resulted in the absolute denial to the Petitioner of his fifth amendment privilege against compulsory self-incrimination 9

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Petitioner, Brian A. Carlson, prays that a writ of certiorari issue to review the judgment and opinion below of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 8, 1980, affirming Petitioner's conviction under 26 U.S.C. § 7203.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in United States v. Carlson, 617 F.2d 518 (9th Cir. 1980), and appears in the appendix hereto. No published opinion was rendered by the United States District Court for the Northern District of California. A copy of said opinion appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 8, 1980. Jurisdiction of this Court is invoked under Title 28, United States Code § 1254 (1) (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled to any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 26, United States Code:

Section 7203.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Section 7205.

Any individual required to supply information to his employer under Section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under Section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by Section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

STATEMENT OF THE CASE

Petitioner is a factory worker who earned $9,346.21 in 1974 and $13,053.53 in 1975. In 1974, the Petitioner claimed 99 withholding exemptions on the withholding tax form (Form W-4) he submitted to his employer, although he was not married and had no dependents. This form remained effective through 1975 and resulted in no federal income taxes being withheld from the Petitioner's wages in either 1974 or 1975.

The Petitioner claimed the fifth amendment on his 1974 and 1975 tax returns (Form 1040). He did not provide any information on the returns from which his tax liability could be calculated. The Petitioner claimed the fifth amendment on his tax returns because of his fear that he would be prosecuted under 26 U.S.C. § 7205 for filing a false with-

holding form and because he feared that completing his tax returns would tend to incriminate him in that respect.

The Petitioner was convicted of a willful failure to file income tax returns in violation of 26 U.S.C. § 7203 in United States District Court for the Northern District of California. The United States Court of Appeals for the Ninth Circuit affirmed the Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I. One of the issues raised by this case, to wit, what questions on a tax return may a taxpayer refuse to answer by claiming the fifth amendment privilege against compulsory self-incrimination when he actually files a return, was specifically reserved by this Court in United States v. Sullivan, 274 U.S. 259, 263 (1927). The Petitioner claimed the privilege on his return in the manner specified by the dictum of this Court in Sullivan, supra. Nevertheless, the court of appeals held that he was not entitled to claim the privilege.

In Sullivan, this Court held that a taxpayer may not under normal circumstances assert the fifth amendment privilege against compulsory self-incrimination by simply refusing to file a return, but stated in dictum that a taxpayer must file a return and assert the privilege on the return with respect to those questions which he feels would tend to incriminate him. In the instant case, the Petitioner did just that. He

filed a return and refused to answer questions concerning such matters as his gross income, the amount of federal income taxes actually withheld, and the number of his deductions. Admittedly, the Petitioner did not provide any information on his return from which his tax liability could be calculated. However, he asserted the fifth amendment privilege with respect to such questions because he felt, and the court of appeals in fact found, that the answers to such questions would tend to incriminate him. Thus, it would seem that the Petitioner was clearly entitled to the benefit of the privilege. Neverthess, the court of appeals held that he was not so entitled.

The court of appeals specifically found that the questions which the taxpayer refused to answer "would have provided 'a lead or clue to evidence

having a tendency to incriminate.'" United States v. Carlson, 617 F.2d 518, 520 (9th Cir. 1980). The court of appeals also found that it was "equally certain that a trial judge examining these facts would find a substantial threat of incrimination." Id. at 520. Nevertheless, the court of appeals relied upon this Court's decision in Sullivan in coming to its conclusion that the Petitioner was not entitled to the protection of the fifth amendment privilege. Id. at 523. Thus, the instant case clearly raised the question of how a taxpayer may validly assert the privilege on his tax return, when, unlike in Sullivan, he actually files a return. The court of appels states that "the policies that justify the Court's adherence to the rule in Sullivan are equally applicable here." Id. However, the Petitioner, unlike the taxpayer in

Sullivan, actually filed a return and claimed the privilege with respect to questions on the return. Thus, it would seem that the question becomes whether a taxpayer may be denied the protection of the privilege when he has filed a return and claimed the privilege with respect to questions on the return in the manner outlined by this Court's dictum in Sullivan where it has been specifically found that the questions which the taxpayer refused to answer had a substantial tendency to incriminate him.

In Sullivan, supra, this Court held:

> As the defendant's income was taxed, the statute of course required a return. . . . In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what,

> if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. . . . In this case the defendant did not even make a declaration, he simply abstained from making a return. . . .

274 U.S. at 263-64 (emphasis supplied; citations omitted.) As already noted, unlike the taxpayer in Sullivan, the Petitioner did file a return and claimed the fifth amendment privilege with respect to questions on the return. In Sullivan, this Court intimated that the question concerning the taxpayer's income in that case would not have been incriminating. In contrast, in the instant case, the questions as to which the taxpayer claimed

the privilege were specifically found by the court of appeals to be potentially incriminating.

In Garner v. United States, 424 U.S. 648 (1976), this Court reaffirmed the significance of the dictum in Sullivan:

> A § 7203 conviction cannot be based on a valid exercise of the privilege. This is implicit in the dictum of United States v. Sullivan, 274 U.S. 259 47 S.Ct. 607, 71 L.Ed. 1037 (1927), that the privilege may be claimed on a return. . . . The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege.

Id. at 662-63 (footnote omitted). Since the Court in Garner, supra, limited its decision to "claims of privilege . . . justified by a fear of self-incrimination other than under the tax law," id. at 650 n. 3, the instant case presents the opportunity for this Court to determine the significance of this Court's decision in Sullivan with regard to a claim of privi-

lege made because of a taxpayer's fear of self-incrimination with respect to prosecution under the tax laws. The taxpayer in the instant case claimed the privilege on his return because of his fear of self-incrimination with regard to 26 U.S.C. § 7205, which prohibits filing a false, withholding form.

II. The court of appeals, in holding that the Petitioner was not entitled to claim the fifth amendment privilege on his tax return, balanced the need for public revenue collection by a system of self-reporting against the Petitioner's privilege against compulsory self-incrimination. Such a balancing approach has never been applied by this Court in a case such as this and is a serious matter for this Court's consideration since the application of such a balancing test inevitably results in a substantial impairment of taxpayers' fifth amendment rights. In the instant case, the court of appeals' use of this balancing test resulted in the absolute denial to the Petitioner of his fifth amendment privilege against compulsory self-incrimination.

In applying this balancing test, the court of appeals relied upon the following statement in the plurality opinion of this

Court in California v. Byers, 402 U.S. 424 (1971):

> Tension between the State's demand for disclosure and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other, neither interest can be treated lightly.

Id. at 427. However, this test was not applied by this Court in the plurality opinion in Byers, supra, and is thus dictum. This test was applied only by one Justice in a concurring opinion. Id. at 448-49 (Harlan, J., concurring).

Under the laws as actually applied by the plurality opinion in Byers, which the court of appeals did not apply in the instant case, the taxpayer in the instant case would clearly be entitled to rely on the claim of privilege he made on his tax return. The plurality opinion in Byers determined the privilege question there involved by inquiring whether "the"

compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination,'" id. at 429, and whether the compelled disclosures were "testimonial." Id. at 432.

There is no doubt that the disclosures required by a tax return, with respect to which the Petitioner asserted his fifth amendment privilege, are testimonial. In Garner v. United States, supra, this Court stated:

> The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimoney of a "witness". . . .

424 U.S. at 656.

There is also no doubt that the Petitioner faced a "substantial hazard of incrimination" with regard to the questions on the return as to which he asserted his fifth amendment privilege. The court of appeals so found. The court

of appeals stated that it was "certain that a trial judge examining these facts would find a substantial threat of incrimination." United States v. Carlson, supra, 617 F.2d at 520.

Even apart from the finding of the court of appeals, it is obvious that the Petitioner faced a substantial hazard of incrimination in answering the questions on the tax return. The Petitioner's fear of self-incrimination resulted from the fact that 26 U.S.C. § 7205 prohibits filing a false witholding form. Allegedly, the Petitioner filed a false withholding form claiming 99 withholding exemptions so that no income taxes would be withheld from his wages. The Petitioner had no dependents and was not married. It is obvious from these facts that the Petitioner's assertion of his fifth amendment privilege with regard to

the questions on the tax return was motivated by his fear of a substantial hazard of self-incrimination. If the Petitioner had stated his gross income, which as $9,346.21 in 1974 and $13,053.53 in 1975, stated that no federal income tax had been witheld, and stated the number of deductions available to him as an unmarried person with no dependents, he would have faced a substantial risk of prosecution under 26 U.S.C. § 7205. Such facts as these, regarding which the Petitioner claimed the privilege, would have strongly indicated that a false withholding form had been filed. The seriousness of the threat of self-incrimination in the instant case results from the fact that the taxpayer's fears of self-incrimination concerned a possible prosecution under the tax laws. The link in the chain of evidence is not

attenuated in the instant case as it was in Sullivan, supra, where the taxpayer feared prosecution under the National Prohibition Act. Because the taxpayer in the instant case feared prosecution under the tax laws, his fear of self-incrimination with regard to answering tax-related questions was direct and substantial.

The court of appeals' use of a balancing test in the instant case raises serious questions. Such "balancing inevitably results in the dilution of constitutional guarantees." California v. Byers, supra, 402 U.S. at 463 (Black, J., dissenting). This balancing approach will have the result "that the scope of the Fifth Amendment's protection will now depend on what value a majority" of judges "chooses to place on this explicit constitutional guarantee as opposed to the

government's interest in convicting a man by compelling self-incriminating testimony." Id. As Mr. Justice Black went on to say:

> In my view, vesting such power in judges to water down constitutional rights does indeed "embark us" on . . . "uncharted and treacherous seas." . . .
>
> I can only assume that the unarticulated premise of the decision is that there is so much crime abroad in this country at present that Bill of Rights' safeguards against arbitrary government must not be completely enforced. I can agree that there is too much crime in the land for us to treat criminals with favor. But I can never agree that we should depart in the slightest way from the Bill of Rights' guarantees that give this country its high place among the free nations of the world.

Id.

As Mr. Justice Brennan stated in Byers, supra:

> Our society is not endangered by the Fifth Amendment. "The dangers of which we must really beware are * * * that we shall fall prey to the idea that in order to preserve our free society some of the liberties of the individual must be curtailed, at

> least temporarily. How wrong that kind of a program would be is surely evident from the mere statement of the proposition." J. Harlan, Live and Let Live, in The Evolution of a Judical Philosophy, 285, 288 (D. Shapiro ed., 1969).

Id. at 474 (Brennan, J., dissenting).

This Court quite rightly hesitated to apply a balancing test in Byers. The court of appeals' conclusion that the government's need for information requires a dilution of the guarantees of the fifth amendment against compulsory self-incrimination is at odds with the immutable character of that privilege:

> The ancient privilege of a witness against being compelled to incriminate himself is precious to free men as a shield against highhanded and arrogant inquisitorial practices. It has survived centuries of controversies, periodically kindled by popular impatience that its protection sometimes allows the guilty to excape punishment. But it has endured as a wise and necessary protection of the individual against arbitrary power, and the price of occasional failures of justice is paid in the larger

interest of general personal security.

United States v. Washington, 431 U.S. 181, 193 (1977) (Brennan, J., dissenting).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NO. 79-1277
	)	
Plaintiff-Appellee,	)	OPINION
	)	
-vs-	)	
	)	
BRIAN A. CARLSON,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court for the Northern District of California

Before: WALLACE and KENNEDY, Circuit Judges, and LARSON,* District Judge

WALLACE, Circuit Judge:

Carlson was convicted of willful failure to file income tax returns in violation of 26 U.S.C. § 7203. On appeal he seeks reversal by claiming that his failure to file proper returns constituted a valid exercise of his Fifth

*Honorable Earl R. Larson, United States District Judge, District of Minnesota, sitting by designation.

Amendment privilege against self-incrimination. We affirm the conviction.

I

Carlson, a factory worker, earned $9,346.21 in 1974 and $13,053.53 in 1975. Although he had filed complete tax returns for previous years, Carlson did not do so for 1974 and 1975. Instead, as part of a tax protest movement, he utilized the following tax-evasion scheme for each of those years. In 1974, Carlson claimed 99 withholding exemptions on the withholding tax form (form W-4) that he submitted to his employer, although he was not married and had no dependents.[1] This form W-4 remained effective through 1975, and resulted in no federal income taxes being withheld from Carlson's wages in either 1974 or 1975. Carlson thereafter asserted the Fifth Amendment on his

1974 and 1975 year-end tax returns (form 1040) in lieu of providing any information from which his tax liability could be calculated. He appended to the 1974 return tax protest material claiming that federal reserve notes were unconstitutional, that he therefore had not received enough constitutionally valid money to require filing a tax return, and that all rules promulgated by the Secretary of the Treasury were also unconstitutional.

The result of Carlson's submission of the false withholding form and his subsequent assertion of the Fifth Amendment in his year-end returns was that Carlson paid no federal income taxes for 1974 or 1975. Carlson claims that he validly asserted the Fifth Amendment to avoid incriminating himself for having previously filed the false withholding forms. After

hearing all of the evidence, however, the district judge, sitting without a jury, found that Carlson "did not have a good-faith claim or reasonable ground for [asserting the] privilege, as he was a tax protestor and his activities and his actions and methods of submitting his returns were those of a tax protestor only." He held, therefore, that Carlson's Fifth Amendment claim did not constitute defense to his prosecution, pursuant to section 7203, for failure to file a tax return.

II

This case presents a question of first impression: can the privilege against self-incrimination constitute a defense to a section 7203 prosecution when it is asserted to avoid incrimination for a past violation of income tax laws? The United States Supreme Court

has stated that "[a] section 7203 conviction cannot be based on a valid exercise of the privilege," Garner v. United States, 424 U.S. 648, 662 (1976), but the Court expressly limited the reach of its decision in Garner to "only those [claims of privilege] justified by a fear of self-incrimination other than under the tax laws." Id. at 650 n.3 (emphasis added). Garner thus left open the extent to which the Fifth Amendment prevents compelled self-incrimination in tax returns for past tax law crimes. No case has been cited to us, and we have found none in other circuits that has dealt directly with this question left open by Garner.[2] We must, therefore, confront the issue for the first time.

We have recently considered the validity of a Fifth Amendment assertion made in a tax return to avoid self-

incrimination for non-tax-law violations. United States v. Neff, No. 79-1286 (9th Cir., 615 F.2d 1235, 1980). We held that the validity of such an assertion should be assessed in light of the following factors: whether the privilege was asserted at the time of filing the return and in response to specific questions contained therein, whether the taxpayer was faced with a real and appreciable danger of self-incrimination, and whether he had reasonable cause to believe that an honest response to the questions would provide a link in the chain of evidence needed to prosecute him for a crime. Id. Moreover, we determined that the trial judge is to ascertain the potentially incriminatory nature of elicited responses by examining the questions, their setting, and the peculiarities of the case, with the burden of showing their hidden danger

falling upon the taxpayer should the trial judge find the questions to be innocuous. Id. at .

An examination of the facts of this case reveals that Carlson did assert the privilege at the time he filed his return, and did so while facing a real and appreciable hazard of prosecution for having previously filed a false withholding form.[3] In addition, there is little doubt that a truthfully completed tax return, stating his gross income, the lack of federal income taxes actually withheld, and the true number of available deductions would have provided "a lead or clue to evidence having a tendency to incriminate" Carlson. Id. at . It is equally ceratin that a trial judge examining these facts would find a substantial threat of incrimination. Thus, it appears that Carlson

satisfies those indicia of validity previously asserted to avoid self-incrimination other than under the tax laws.

When the privilege is asserted to avoid incrimination for past tax crimes, however, additional complications arise. If Carlson's assertion of the privilege were valid, it would license a form of conduct that would undermine the entire system of personal income tax collection. The essence of Carlson's plan was to claim 99 withholding exemptions so that no federal income tax would be withheld by his employer, and then to assert the Fifth Amendment privilege in lieu of a properly completed tax return, thus attempting to avoid both prosecution for the false withholding claim and payment of required income taxes. The widespread use of such a scheme would emasculate the present system of revenue collection

which, by virtue of its scope alone, necessarily depends upon personal reporting by wage earners.[4] We are thus confronted with the collision of two critical interests: the privilege against self-incrimination, and the need for public revenue collection by a process necessarily reliant on self-reporting.

To decide which of these two interests prevails, we follow Supreme Court guidance:

> Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

California v. Byers, 402 U.S. 424, 427 (1971).[5] We approach this balancing task with care, for we believe that fundamental constitutional protections, such as

the privilege against self-incrimination, may be limited only for the most substantial of reasons. See id. at 448 (Harlan, J., concurring). The Supreme Court has stated that "the privilege has never been given the full scope which the values it helps to protect suggest," Schmerber v. California, 384 U.S. 757, 762 (1966), but it has also persistently instructed that the privilege "must be accorded liberal construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951); see Arndstein v. McCarthy, 254 U.S. 71, 72-73 (1920); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892), disapproved on other grounds, Kastigar v. United States, 406 U.S. 441, 449-55 (1972). In balancing Carlson's assertion of the privilege against the governmental interest in revenue collection, we

conclude that there are two factors we should consider: the history and purposes of the privilege, and the character and urgency of the countervailing public interests. California v. Byers, supra, 402 U.S. at 449 (Harlan, J., concurring).

The history of the privilege against self-incrimination predates its enshrinement within the Bill of Rights. See 8 Wigmore, Evidence § 2250, at 267-92 (McNaughton Rev. 1961); Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935). It initially arose in response to procedures whereby the ecclesiastical courts of England would compel one against whom no charge had been made to incriminate himself in response to broad, incrimination-seeking questions. McCormick on Evidence 248 (1972). The privilege,

which had been recognized to some extent in colonial America, Pittman, supra, at 781, and which had been incorporated into the constitutions of several states prior to ratification of the federal Constitution, id. at 764-65, was adopted by the drafters of the Bill of Rights "not only [as] an answer to numerous instances of colonial misrule but [as] a shield against 'the evils that lurk[ed] in the shadows of a new and untried sovereignty.'" McCormick on Evidence, supra, at 248 quoting, Pittman, supra, at 789.

As history illustrates, the primary purpose of the privilege is protective.

> The ancient privilege of a witness against being compelled to incriminate himself is precious to free men as a shield against high-handed and arrogant inquisitorial practices. It has survived centuries of controversies, periodically kindled by popular impatience that its protection sometimes allows the guilty to escape punishment. But it has endured as a wise and

> necessary protection of the individual against arbitrary power, and the price of occasional failures of justice is paid in the larger interest of general personal security.

United States v. Washington, 431 U.S. 181, 193 (1977) (Brennan, J., dissenting). Stated differently, the privilege is an effort to "comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself . . . ." 8 Wigmore, Evidence § 2251, p. 318 (McNaughton Rev. 1961).

In the case before us, Carlson has attempted to take advantage of the privilege's protective capacity to further a calculated effort to avoid the payment of taxes. Although it is true that

Carlson actually seeks protection against self-incrimination for his prior tax crime, he does so only as part of an overall plan to evade taxes. The first step of that plan--submitting a false withholding form to his employer--was concealed from the Service by assertion of the Fifth Amendment on Carlson's year-end returns; and the very act of asserting the Fifth Amendment also effectuated the second step of the plan--failing to file meaningful returns that would divulge both his prior misstatement and his overall year-end tax liabilities. In other words, the Fifth Amendment was the linchpin of Carlson's plan to evade the payment of taxes. He used the privilege more as a sword than as a shield. See United States v. Schmitz, 525 F.2d 793, (9th Cir. 1975); accord, United States v. Newman, 468 F.2d 791, 795 (5th Cir. 1972),

cert. denied, 411 U.S. 905 (1973). The history and purpose of the privilege do not, in light of such circumstances, weigh heavily in favor of extending its coverage to Carlson.

At the same time, the character and urgency of the public interest in raising revenue through self-reporting weighs heavily against affording the privilege to Carlson. The federal government's power to raise revenue is its lifeblood. Were taxpayers permitted to employ Carlson's scheme, they could avoid filing completed tax returns and thereby severely impair the government's ability to determine tax liability. Such frustration of the self-reporting system would force the Internal Revenue Service either to investigate each citizen's claimed and permissible withholding exemptions in an effort to prosecute for each separate

filing of a false withholding claim, or to bear the burden of investigating and calculating from scratch each citizen's tax liability in order to assess the appropriate amount of income tax. Needless to say, either alternative would be inordinately burdensome if not impossible.

Another factor in our weighing process is that the requirement of filing an annual income tax return is primarily designed to facilitate revenue collection, not criminal prosecution. "[T]he questions in the income tax return [are] neutral on their face and directed at the public at large." Albertson v. SACB, 382 U.S. 70, 79 (1965). For this reason, refusal to file any return at all has never been protectable by a taxpayer's privilege against self-incrimination. United States v. Sullivan, 274 U.S. 259,

263-64 (1927). We think the policies that justify the Court's continued adherence to the rule in Sullivan are equally applicable here.

After weighing the appropriate factors, we conclude that the purpose and history of the privilege against self-incrimination do not compel protection of Carlson's actions, and that the character and urgency of the opposing revenue interests require that his scheme not be permitted. We therefore hold that an individual who seeks to frustrate the tax laws by claiming too many withholding exemptions, with an eye to covering that crime and evading the tax return requirement by assertion of the Fifth Amendment, is not entitled to the amendment's protection.[6]

III

In spite of our holding that Carlson is not entitled to protection of the Fifth Amendment, we still must review the district court's finding that Carlson did not assert his claim in "good faith." This finding is not mooted by our holding that Carlson's assertion of the privilege was invalid, due to a statement in Garner: "Because § 7203 proscribes 'willful' failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. . . . [A] defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." Garner v. United States, supra, 424 U.S. at 663 n.18. The "good faith" referred to in Garner, of course, is not necessary for proper assertion of the privilege against self-incrimination: we do not normally examine the good faith

of an individual seeking the privilege's protection, we simply examine the reality and appreciability of the hazard he claims to be facing. United States v. Neff, supra, slip op. at . In prosecutions of the kind before us, however, a defendant's assertion of even an invalid Fifth Amendment claim in "good faith" would defeat the section 7203 requirement that a failure to file income tax returns be "willful." Someone who thinks he is complying with the law cannot be said to be "willfully" violating it. Therefore, we must review the trial court's finding that Carlson did not make his claim in good faith.

The trial judge's determination was a finding of fact. "[U]pon appeal of a conviction in a criminal case the evidence must be considered in a light most favorable to the government and the

findings of fact of a trial judge (or jury) may not be set aside unless clearly erroneous." United States v. Glover, 514 F.2d 390, 391 (9th Cir.), cert. denied, 423 U.S. 857 (1975); United States v. Hood, 493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974). The record clearly discloses that Carlson was a tax protestor who attempted to frustrate the tax laws by use of the Fifth Amendment. We cannot say that the trial judge's conclusion that Carlson failed to assert the privilege in good faith was clearly erroneous.

AFFIRMED.

FOOTNOTES

1. Needless to say, 99 withholding exemptions far exceeded the number to Carlson. 26 U.S.C. § 3402(f)(1).

2. United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 99 S. Ct. 2831 (1979), confronted the same fact situation as that before us but did not resolve the question left unanswered by Garner.

3. The government concedes that Carlson could have been prosecuted under 26 U.S.C. § 7205 for filing a false withholding form.

4. Because withholding forms are filed only with the employer, 26 U.S.C. § 3402(f)(2), false forms are not readily detected by the Internal Revenue Service. This problem is compounded when the taxpayer successfully refuses to provide the IRS with information

normally received in a tax return.

5. In Byers, a majority of the court expressly adopted this balancing approach: three Justices joined Chief Justice Burger in the plurality opinion, California v. Byers, 402 U.S. 424, 425 (1971), and Mr. Justice Harlan applied such a balancing analysis in his concurrence. Id. at 448-49. After articulating the balancing approach, however, the plurality opinion failed to apply it, id. at 427-34, and we thus recognize the plurality balancing language to be dictum. We agree, nonetheless, with Justice Harlan's conclusion that the Fifth Amendment's preference for an accusatorial (rather than inquisitorial) system of criminal law enforcement is not "of such overriding significance that [it] compel[s] substantial sacrifices in the efficient pursuit of other

governmental objectives in all situations where the pursuit of those objectives requires the disclosure of information which will undoubtedly significantly aid in criminal law enforcement." Id. at 448 (Harlan, J., concurring).

The dissenting Justices in Byers argued forcefully that "this balancing inevitably results in the dilution of constitutional guarantees," id. at 463 (Black, J., dissenting), and that we should not "depart in the slightest way from the Bill of Rights." Id. See also Olmstead v. United States, 277 U.S. 438, 472-77 (1928) (Brandeis, J., dissenting). We believe, however, that their absolute approach would undercut the precedent of United States v. Sullivan, 274 U.S. 259 (1927) (Fifth Amendment does not justify a complete failure to file a tax return).

It cannot be denied that the act of refusing to file a tax return may

> give rise to a permissible inference . . . that one who did not file was indeed engaged in criminal activity. The incriminating inference arises from inaction rather than from any utterance or active disclosure, but nevertheless there is an inference of a guilty state of mind, from which can be inferred the criminal facts. These inferences are made possible by the general obligation to report income and the exception when the report would result in an incriminating disclosure.

Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 118. Consequently, were we to adhere to an absolute protection against incrimination, we would be forced either to abandon a highly important information gathering device or to engage in the fiction that it does not incriminate. We

doubt that even the dissenters in Byers would be willing to carry the privilege so far.

We agree that "'the scope of the privilege [does not coincide] with the complex of values it helps to protect.'" California v. Byers, supra, 402 U.S. at 449 (Harlan, J., concurring), quoting Schmerber v. California, 384 U.S. 757, 762 (1966). Whether the government may punish a person who asserts the privilege in lieu of providing tax information "cannot be answered on the ground that compelling him to come forward is not incriminating, for it surely is. It can only be answered by determining whether the government's interest in raising revenue is sufficiently important to justify some reduction in the protection of the privilege." Mansfield, supra, at 120.

6. It may be that the crime of claiming too many withholding allowances, even when not undertaken as part of a scheme such as Carlson's, will never be protected by assertion of the Fifth Amendment on a tax return because of the character and urgency of the tax laws which may mandate such a result. We need not, however, decide that question to resolve this case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	NO. 79-1277
Plaintiff-Appellee,	O R D E R
-vs-	
BRIAN A. CARLSON,	
Defendant-Appellant.	

Before: WALLACE and KENNEDY, Circuit Judges, and LARSON,* District Judge

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for

*Honorable Earl R. Larson, United States District Judge, District of Minnesota, sitting by designation.

rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	NO. CR-78-498-CBR
Plaintiff,	MEMORANDUM OF OPINION
vs.	
RANDALL B. CARLSON,	
Defendant.	

This is a criminal prosecution brought pursuant to Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. §7203.[1] Defendant is charged with two

1 Section 7203 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

counts of willfully failing to make income tax returns, a misdemeanor.[2] The pertinent facts are undisputed and have been stipulated to by the parties. Defendant has voluntarily waived his right to a trial by jury. See Fed.R. Crim.Pro. 23.

In 1974 and 1975, the years in question, defendant Randall B. Carlson was employed by United Can Company. His W-2 forms indicate that he was paid wages

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2 Each count of the information states that for the year in question defendant "was required by law * * * to make an income tax return * * * stating specifically the items of his gross income and any deductions, exemptions[,] and credits to which he was entitled[;] and that, well knowing all of the foregoing facts, he did willfully and knowingly fail to make such income tax return * * *." In this opinion, the Court will focus on defendant's failure to state his "gross income and * * * exemptions," because his failure to state "deductions * * * and credits" could only have increased rather than decreased his tax liability.

of $19,465.15 the first year and $16,873.29 the second. However, he did not file a completed income tax return with the Internal Revenue Service (IRS) for either year. With respect to 1974, he simply mailed a Form 1040 to the IRS on which he stated his name and address and wrote across the face of the form, "Under protest I plead the Fifth Amendment to the U. S. Constitution," and signed and dated the return. With respect to 1975, he mailed a Form 1040 to the IRS on which he stated his name, address, and Social Security number and wrote across the face of the form, "Filed in protest of the Fifth Amendment to the Constitution of the U.S.A." Again, he signed and dated the return.

Defendant claims that he invoked the Fifth Amendment to avoid prosecution

under 18 U.S.C. §1001[3] and 26 U.S.C. §7205,[4] criminal statutes that prohibit making false statements to a government agency and submitting false withholding statements to an employer. These

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3 18 U.S.C. §1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

4 26 U.S.C. §7205 provides:

"Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both."

prosecutions would have been based on the W-4 forms defendant had earlier filed with United Can Company. Although he was then single and had no dependents, defendant claimed 18 withholding allowances on December 12, 1973, 30 withholding allowances on January 11, 1974, 90 withholding allowances on April 30, 1974, and 99 withholding allowances on October 14, 1974.[5]

5 There is no question but that defendant could have been prosecuted under 18 U.S.C. §1001 and 26 U.S.C. §7205 for submitting these W-4 forms had the Government acted within the applicable limitations period. For some reason unknown to this Court, however, the Government neglected to institute criminal proceedings against defendant until the statute of limitations period for those violations had run. For that reason, the Government in this prosecution must rely on 26 U.S.C. §7203, a statute which carries with it a six-year, rather than a three-year statute of limitations. See 26 U.S.C. §6531; United States v. Porth, 426 F.2d 519, 522 (10 Cir.) cert. denied, 400 U.S. 824 (1970).

To establish a violation of 26 U.S.C. §7203, the Government must prove that defendant was required to make a return, that he failed to do so, and that this failure was willful. Because the Government has not established proof of the second and third elements beyond a reasonable doubt, this Court must acquit.

There is no question that defendant was required to file a tax return for 1974 and 1975. With wages in excess of $19,000 the first year and in excess of $16,000 the second, his gross income was significantly greater than the minimum established by 26 U.S.C. §6012(a). The stipulated facts therefore establish the first element of a §7203 violation beyond a reasonable doubt.

There is more difficulty with the second element, however, for although defendant did not technically file a

return for 1974 or 1975, he appears to have a valid constitutional defense to the §7203 filing requirements. When defendant mailed his 1040 forms to the IRS in 1974 and 1975, he failed to include any information in them from which the Government could compute his tax. As a result, under the great weight of authority, he did not file a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner. See United States v. Klee, 494 F.2d 394, 397 (9 Cir.), cert. denied, 419 U.S. 835 (1974), quoting United States v. Porth, 426 F.2d 519, 523 (10 Cir.), cert. denied, 400 U.S. 824 (1970); accord, United States v. Johnson, 577 F.2d 1304, 1311 (5 Cir. 1978); United States v. Gardiner, 531 F.2d 953 (9 Cir.), cert. denied, 429 U.S. 853 (1976).

Defendant contends, however, that his

failure to include any wage and exemption information on his tax returns was justified insofar as he had a valid Fifth Amendment privilege not to make such disclosures. In this contention he relies on Garner v. United States, 424 U.S. 648, 662 (1976), and United States v. Sullivan, 274 U.S. 259, 263 (1927), cases in which the Supreme Court affirmed the right of a taxpayer to refuse to answer incriminating questions on a tax return. Although these cases state that a taxpayer cannot rely on the Fifth Amendment to "refuse to make any return at all," the Supreme Court indicated that a taxpayer may still invoke the Fifth Amendment on his tax return with respect to each item to which he has a valid constitutional objection. See 262 U.S. at 263. See also United States v. Johnson, supra, 577 F.2d at 1310;

Heligman v. United States, 407 F.2d 448, 450-451 (8 Cir.), cert. denied, 395 U.S. 977 (1969). A taxpayer cannot "simply abstain * * * from making a return" because he has a valid Fifth Amendment privilege as to some of the information requested. However, where he provides the IRS with the non-testimonial information it seeks, and only invokes the Fifth Amendment with respect to those items that create "'substantial hazards of self-incrimination,'" California v. Byers, 402 U.S. 424, 429 (1971), he must be held immune from prosecution under §7203. Cf. Garner, supra, 424 U.S. at 662 n.16 (no privilege to refuse disclosure of non-testimonial information "fundamental to a neutral reporting scheme").

Here, defendant is charged with a willful failure to state "specifically

the items of his gross income and * * * exemptions." See note 2, supra. If defendant's claim that disclosure of this information would have subjected him to criminal prosecution is valid, then his Fifth Amendment claim must be upheld and the Court cannot convict under 26 U.S.C. §7203.

Defendant was concerned that his willful submission of false withholding certificates -- the W-4 forms listing up to 99 allowances -- subjected him to prosecution under, inter alia, 26 U.S.C. §7205. Because he claims that this statute requires the Government to prove first, that he had income in the form of wages, and second, that he had willfully claimed a false number of withholding allowances, he argues that the income and exemption information on his Form 1040 was privileged from disclosure.

The Government cannot reasonably deny that defendant could have subjected himself to prosecution under §7205 had he indicated on his 1040 forms the number of exemptions he was claiming. The real issue is whether proof that the taxpayer earned income in the form of wages is one of the elements of §7205 as well.

Section 7205 applies to "[a]ny individual required to supply information to his employer under [26 U.S.C.] section 3402 * * *." Section 3402 by its terms applies to "every employer making payment of wages." Reading these statutory provisions together, the Court concludes that the Government could successfully prosecute a taxpayer under §7205 only if it first proved that the taxpayer had received some wages from his employer. Cf. United States v. Smith, 487 F.2d 329, 330 (9 Cir. 1973), cert. denied, 416 U.S.

989 (1974) ("[§7205] offense is made out when a person required by law to complete and file a W-4 intentionally uses the form to supply false information."). Unless the employer paid wages pursuant to §3402, the defendant would not be required to supply withholding information pursuant to §7205.

Applying this construction to §7205, the Court must find that defendant validly invoked his Fifth Amendment privilege against disclosing wage and exemption information.[6] Because disclosure of that

6 The Government's contention that defendant could have avoided incriminating himself by listing his wages on line 12 of his tax returns rather on line 9 is specious. Line 12 specifically calls for "Income other than wages, dividends, and interest" (emphasis added). The only income defendant received in 1974 and 1975 -- at least according to the stipulated facts on which the Court must base its decision -- was the wages paid by his employer, United Can Company. These could properly have been listed only as "Wages, salaries, tips and other employee compensation" (emphasis added) on line 9.

information would have subjected him to criminal prosecution, this Court must find that his invocation of the Fifth Amendment was proper. See California v. Byers, supra, 402 U.S. at 439-440, 441 n.3 (Harlan, J., concurring); see also United States v. Irwin, 561 F.2d 198, 201 (10 Cir. 1977), cert. denied, 434 U.S. 1012 (1978) ("A valid claim of privilege must be based upon a real possibility that submitting answers will subject the taxpayer to criminal prosecution.").

Despite this conclusion, the Court is concerned with the form in which defendant invoked his privilege. Defendant's tax returns contained only his name, address, signature, date, and a non-specific Fifth Amendment claim. This case would have been easier to decide had defendant separately stated his

constitutional privilege as to wages and as to exemptions, then drawn a line through the other boxes on his returns. However, defendant's "broad brush" method should not change the result here.

As this Court has found, defendant was privileged to refuse to state the amount of his wages and the number of his exemptions. The Government has not alleged that he wrongfully failed to include any other data on his return. Nowhere in the stipulated facts is it indicated that defendant had any other taxable income. As a result, the Court must conclude that defendant was not required to respond to the other items on his return. Because defendant validly asserted his Fifth Amendment privilege as to the only items on his return that the Government alleges he was required to respond to, the Court must acquit.

Criminal liability cannot hinge on the technical question of whether defendant's valid claim of a constitutional privilege was asserted in large letters covering the face of the return rather than in the small boxes corresponding to the requests for the privileged information.

Even if the Court were wrong in concluding that defendant properly claimed a Fifth Amendment privilege, it would reach the same result. Although the Government may have proven beyond a reasonable doubt that defendant was required to file returns for 1974 and 1975 and that he had no privilege justifying his failure to file those returns, the Government's case would nonetheless falter on the third element of §7203, proof beyond a reasonable doubt that defendant's failure to file was "willful."

Section 7203 is very explicit in its mens rea requirement. It only applies to individuals who "willfully" fail to meet their statutory obligations. As the Supreme Court noted in Garner v. United States, supra, 424 U.S. at 663 n.18:

> "Because §7203 proscribes 'willful failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith."

Other courts have agreed that a taxpayer could not be successfully prosecuted under 26 U.S.C. §7203 if his invocation of the Fifth Amendment, although erroneous, was made in good faith. See, e.g., United States v. Johnson, supra, 577 F. 2d at 1311; Cooley v. United States, 501 F.2d 1249, 1252-1253 & n.4 (9 Cir. 1974), cert. denied, 419 U.S. 1123

(1975).[7]

On the stipulated facts and without an opportunity to listen to and observe the defendant, assuming that he took the stand to testify, this Court could not conclude beyond a reasonable doubt that defendant's invocation of the Fifth Amendment on his 1974 and 1975 tax returns was not made in good faith. As the discussion of the second element of §7203 indicates, defendant's exercise of his Fifth Amendment privilege was proper, both as to its form and its

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7 The cases relied upon by the Government to establish willfulness all arose in the context of a taxpayer who had no basis whatever for invoking the Fifth Amendment. See, e.g., United States v. Irwin, 561 F.2d 198 (10 Cir. 1977), cert. denied, 434 U.S. 1012 (1978); United States v. Gardiner, 531 F.2d 953 (9 Cir.), cert. denied, 429 U.S. 853 (1976); United States v. Daly, 481 F.2d 28 (8 Cir.), cert. denied, 414 U.S. 1964 (1973); United States v. Porth, 426 F.2d 519 (10 Cir.), cert. denied, 400 U.S. 824 (1970).

content. Surely it would follow that even if the Court's legal analysis were incorrect, defendant's attempt to invoke the privilege was done with a good-faith belief in its validity. Because there is no evidence before this Court to the contrary, and because the Court has had no opportunity to assess the motivation or credibility of the defendant at trial, it must conclude that the Government has failed to prove beyond a reasonable doubt that if defendant failed to file, such failure was "willful" within the meaning of §7203.

The Court is certainly aware that it is acquitting a man whose actions in submitting the false withholding certificates were clearly illegal. There were at least two statutes under which the Government could have successfully prosecuted this action. However, because the

applicable period of limitations had run, those statutes became unavailable. Moreover, even under §7203, the Government might have prevailed had it been able to prove that defendant had received income other than wages in 1974 and 1975 and had therefore invoked his Fifth Amendment privilege in bad faith. However, no such evidence was presented to the Court. As a result, the Court concludes that it must acquit defendant Randall B. Carlson of the charges of having violated 26 U.S.C. §7203.

This Memorandum of Opinion shall constitute the Court's General and Special Findings as required by Rule 23(c) of the Federal Rules of Criminal Procedure.

Dated:

Charles B. Renfrew
United States District
Judge

PETER R. STROMER
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Attorney for Defendant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, -v- BRIAN A. CARLSON, Defendant.	CRIMINAL NUMBER: 78-400-SC O R D E R

Defendant BRIAN A. CARLSON'S Motion to Stay Execution of Sentence Pending Appeal came on for hearing in the courtroom of U. S. Magistrate, the Honorable O. E. Woodruff, Jr., 450 Golden Gate Avenue, San Francisco, California, on April 9, 1979, at 9:30 a.m. there being

no opposition to the Motion.

IT IS HEREBY ORDERED that the defendant be and hereby is granted a Stay of Execution of Sentence in the above-captioned case. The defendant, Brian A. Carlson, being personally present and represented by counsel, Peter R. Stromer, Esq., having executed an Appearance Bond in the amount of $5,000 is ordered to appear when summoned before the Honorable Samuel Conti, upon final determination of defendant's pending
to the U. S. Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that defendant

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Brian A. Carlson, comply with all the conditions detailed on the Appearance Bond.

Approved as to form and content:

_____
Nancy L. Simpson
Assistant U.S. Attorney

DATED: _____

_____
OWEN E. WOODRUFF, JR.
United States Magistrate

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

Brian A. Carlson,

Petitioner,

v.

United States of America

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CERTIFICATE OF SERVICE

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I hereby certify that on this 5th day of August, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Nancy L. Simpson, Assistant U.S. Attorney, P.O. Box 36055, San Francisco, CA 94102.

I further certify that all parties required to be served have been served.

Peter R. Stromer